Supreme Court, U.S.
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No. 94-951

In The

Supreme Court of the United States

October Term, 1994

IN RE ESTATE OF SHELTON A. McHENRY, *Deceased.*

EDWARD S. HALL, *et al.*,

Petitioners,

vs.

THOMAS E. O'SULLIVAN, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The California Court Of Appeals

OBJECTION TO MOTION OF THE CALIFORNIA JUSTICE FOUNDATION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

RUTTER, O'SULLIVAN, GREENE & HOBBS INCORPORATED
FRANK D. HOBBS*
1900 Avenue of the Stars
Suite 2700
Los Angeles, California 90067
(310) 286-1700

Attorneys for Respondent
Thomas E. O'Sullivan

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

STATEMENT OF REASONS FOR WITHHOLDING CONSENT TO FILING OF *AMICUS CURIAE* BRIEF

On December 20, 1994, counsel for Respondent Thomas E. O'Sullivan received a written request from the self-styled "California Justice Foundation" for O'Sullivan's consent to the filing of an *amicus curiae* brief in this matter. Counsel for O'Sullivan, not having heard before of the Foundation, promptly wrote by facsimile transmission to the Foundation respectfully requesting an explanation of its interest in this case, and a description of its familiarity with the record in the underlying proceedings.

No reply to the request was received by O'Sullivan's counsel before the time for filing the briefs in opposition to the Petition for Writ of Certiorari had passed, and no indication whatever has been given by the Foundation of any familiarity with the record below. Because the entity was unknown, its interest was unarticulated and because the Foundation had no known understanding of the record, counsel for O'Sullivan declined to consent to the filing of a brief by the Foundation.

O'Sullivan's caution in giving consent for the Foundation to file an *amicus curiae* brief appears to have been judicious. Purporting to apply "extensive experience in the proper standards of an attorney's conduct," the Foundation, ironically, indulges even more than Petitioners already have either in distorting, or plainly ignoring, the record below. Moreover, rather than raise any Constitutional issue, the Foundation merely argues, in substance, that this Court should determine that New York law, which is construed by the Foundation as friendly to Petitioners' cause, should

apply in California courts in matters involving transactions between attorneys and their clients.

Little is known to Respondent O'Sullivan about the California Justice Foundation, or about its real ends in seeking leave to file its brief. Belying any objectivity about the facts and ignorance of the record, it seeks leave to file the brief in a style curiously reminiscent of that of trial counsel below, referencing "evidence," already considered and judged by the trial court to have been "made up" or otherwise unreliable.

As an example, the Foundation refers alluringly to the "legally blind" McHenry (Motion, pp. 3 and 8). The trial court, however, found based on the testimony of Petitioners' own expert witness that McHenry was not legally blind, and was able to read print smaller than the type in the Foundation's motion (Opp. Brief[1], p. App. 22). Likewise, the Foundation refers to the action having been treated as a "short cause matter" in which the parties were given "a few hours" for trial despite the fact that the trial occurred over a period of five days (Opp. Brief, p. App. 12) in front of a judge well-familiar with the matter. This type of misconstruction of the record in the Motion and in the proffered brief is epidemic.

The Foundation's assumption that the lawyer's conduct in this action was "treated lightly" is strongly rebutted by the record, of a trial on the merits and multiple appeals, already before this Court. The premise appears in reality to be nothing more than an excuse for the

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[1] Brief of Respondent Thomas E. O'Sullivan in Opposition to Petition for Writ of Certiorari.

Foundation to repeat Petitioners' titillating fragments of "evidence" which they wish the trial court had believed.

Though the merits of the Foundation's proposed brief are not the issue here, it should be observed that the kind of liberties taken by the Foundation in construing the record seem to be indicative of the legal analysis urged on the Court. The Foundation utterly misconstrues the scarce California case law on which it relies.[2] The Foundation then posits that this Court should require California to adopt New York, rather than its own, law as its standard in reviewing the trial court's findings about the conduct of a California lawyer.

At the crux of the Foundation's position, however, is the idea that the Due Process clause of the Fourteenth Amendment of the Constitution requires this Court to create a uniform rule among the States prohibiting members of their respective state bars from inheriting under wills prepared by them. It is not the province of the Federal courts to choose among the laws of the States regarding wills, trusts and estates.

The Foundation also argues that a higher standard of review should apply in cases such as this, misapprehending existing California law, which provides that the appellate court review the evidence in light of the burden

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[2] See, e.g. the Foundation's citation to *Estate of Teed*, 112 Cal. App. 2d 638, 247 P. 2d 54 (1952) (Motion, p. 11), apparently for the premise that it is improper for a lawyer to be believed when testifying in his or her own behalf. *Teed*, in fact, dealt with the question of a decedent's testamentary capacity. It did not involve a lawyer's credibility in any way, and does not appear to support the premise for which it is cited in any way.

of proof applicable at the trial level, whether that burden is one of "clear and convincing," or a "preponderance of evidence," or some other burden. Thus, as discussed in O'Sullivan's Opposition Brief, the California courts are required to, and in this case explicitly did, assess the evidence in light of an already strict standard.

Finally, the Foundation argues without authority or a rationale, that the testimony of the lawyer who drafted the will should be excluded, or the gift should be declared void *ab initio* in order to afford due process. This argument leads toward the proposition that in any transaction in which a lawyer has a pecuniary interest, he should be irrebuttably presumed to have behaved unethically. Ironically, were such a presumption to have been applied in the case at bar, it might be the lawyer in front of this Court legitimately complaining of denial of due process.

In this matter, under the applicable California law, O'Sullivan was properly burdened by a legal presumption of the presence of undue influence in the preparation of the will, allowing the Petitioner will contestants to proceed to trial in the absence of any evidence of wrongdoing on the attorney's part. Surely, any notion of "due process" would afford even a lawyer the opportunity to prove, as was the case here, the existence of the unusual circumstances which rendered the gift proper.

It is respectfully submitted that the input of a palpably poorly informed third-party, however well-intentioned the Foundation purports to be, would be of no assistance to the Court in evaluating the issues presented by Petitioners.

CONCLUSION

The Foundation clearly buys into the negative public perception of lawyers. Without having done its homework, the Foundation asks the Court to assume without any support in fact, that a lawyer has acted unethically. If the Foundation had read the trial transcript and reviewed the record of the multiple appeals, it would have seen that the trial and appellate Courts were circumspect in adhering to strict standards of proof and review. It is respectfully submitted that this Court should no sooner rely on a distorted rendition of the underlying facts to permit the filing of an *amicus curaie* brief than it should so rely to grant Certiorari, and that the Foundation's motion should be denied.

Dated: January 6, 1995

RUTTER, O'SULLIVAN, GREENE
& HOBBS INCORPORATED
FRANK D. HOBBS*
1900 Avenue of the Stars
Suite 2700
Los Angeles, California 90067
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